

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RACHEL CALDERON-LOPEZ,

Defendant and Appellant.

A156607

(Lake County
Super. Ct. No. CR928905)

Rachel Calderon-Lopez appeals from a judgment after an order revoking her probation. She seeks a conditional reversal and remand for the trial court to conduct a mental health diversion eligibility hearing under Penal Code section 1001.36,¹ which became effective after she was convicted of various offenses but before her probation was revoked and she was sentenced to prison. We agree that a conditional reversal and remand is appropriate.

BACKGROUND

Between 2008 and 2012, Calderon-Lopez pled guilty or no contest to a series of offenses including writing multiple checks with insufficient funds, burglary, robbery and failure to appear. Following an extensive history of probation violations and reinstatements, in February 2019, the court permanently revoked Calderon-Lopez's probation and sentenced her to an aggregate prison term of seven years and eight months.

¹ Further statutory citations are to the Penal Code.

DISCUSSION

The sole question on appeal is whether Calderon-Lopez is entitled to a remand for a mental health diversion eligibility hearing pursuant to section 1001.36. The People assert she is not. They contend section 1001.36 does not apply to a defendant adjudicated guilty before its effective date and, if it does, that remand is inappropriate because Calderon-Lopez would be found ineligible for mental health diversion under the new provision. We disagree on both points.

I. Application of Section 1001.36

Pursuant to section 1001.36, a trial court may grant pretrial diversion to a defendant who meets all of the six requirements specified in subdivision (b)(1) of the statute. (§ 1001.36, subd. (a).) “At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion” and “[i]f a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate.” (§ 1001.36, subd. (b)(3).)

The maximum period of pretrial diversion is two years. (§1001.36, subd. (c)(3).) If the defendant commits additional crimes or otherwise performs unsatisfactorily in the diversion program, the trial court may reinstate the criminal proceedings. (§ 1001.36, subd. (d).) “If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant’s criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.” (§1001.36, subd. (e).) If the court dismisses the charges upon successful completion of diversion, “the arrest upon which the diversion was based shall be deemed never to have occurred.” (§ 1001.36, subd. (e).)

As previously indicated, section 1001.36 was enacted after Calderon-Lopez entered guilty pleas in five separate cases in Lake County. The question whether the statute applies to cases like hers that are not yet final is currently pending before the California Supreme Court in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review

granted December 27, 2018, S252220. *Frahs*, applying the rule of *In re Estrada* (1965) 63 Cal.2d 740, as applied in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, held section 1001.36 applies to all cases that were not final as of its effective date because it confers a potential “ ‘ameliorating benefit’ ” that the Legislature intended “to apply as broadly as possible.” (*Frahs, supra*, at p. 791.)

Since briefing was completed in the present case, the Fifth District Court of Appeal took the opposite position in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), review granted September 11, 2019, S256671. *Craine* held that “section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing.” (*Id.* at p. 760.) While recognizing that section 1001.36 “confers a potentially ameliorative benefit to a specified class of persons” (*id.* at p. 754), the *Craine* court concluded that “the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants . . . who have already been found guilty of the crimes for which they were charged.” (*Id.* at p. 749.) The Sixth District Court of Appeal in *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted October 9, 2019, S257049, Division 5 of this court in *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted November 26, 2019, S258541, and Division 1 of the Fourth District Court of Appeal in *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738 reached the same conclusion as *Frahs*, disagreeing with *Craine*.

We agree with the reasoning of the *Frahs*, *Weaver*, *Hughes*, and *Burns* courts and join them in concluding section 1001.36 applies in all cases not yet final. As the issue is already pending in the California Supreme Court, no useful purpose would be served by reiterating the careful analyses set forth in those cases.

II. Remand is Necessary

The People argue that even if the statute applies here, remand is not necessary because no court would find Calderon-Lopez eligible for diversion. They point to Calderon-Lopez’s long criminal history, dismal probation compliance, drug use, mental health problems, and failures to comply with her psychotropic medication regime to

argue that no court would make such a finding. Calderon-Lopez suffers from auditory hallucinations and “is periodically angry and [demonstrates] the potential for explosive hostile actions to others.” In 2016 she was diagnosed with “major depressive disorder probably of the bipolar type, or alternatively schizo-affective disorder.” In 2018 she was diagnosed as actively psychotic and was still responding to auditory hallucinations. Of further concern, in 2016 Calderon-Lopez threatened to assault an officer who responded to her husband’s concerns about her behavior. In 2018 she struck a woman who had slept with her husband with a hammer three or four times, causing a significant amount of bleeding.

The People assert this all demonstrates that Calderon-Lopez cannot show she “will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community,” one of the prerequisites for diversion. (§ 1001.36, subd. (b)(1)(F).) We are not so sure. True, her history unquestionably indicates a likelihood of future offenses and some risk of disruptive and even violent behavior. But the People ignore the precise definition of “unreasonable risk of danger to public safety” that the Legislature uses in section 1001.36. Section 1170.18, subdivision (c), defines “unreasonable risk of danger to public safety” as “an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.” Section 667, subdivision (e)(2)(C)(iv), in turn, lists the following offenses: “A ‘sexually violent offense’ as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code”; specified sexual offenses against a child under 14 years of age; any homicide or attempted homicide; solicitation to murder; assault with a machine gun on a peace officer or firefighter; possession of a weapon of mass destruction; and “[a]ny serious or violent felony offense punishable in California by life imprisonment or death.” Section 1001.36’s safety requirement is thus not that the court must be satisfied the defendant will not pose any unreasonable risk of danger to public safety, but specifically that she will not pose an unreasonable risk of committing one of the violent felonies listed in section 667, subdivision (e)(2)(C)(iv). (§ 1001.36, subd. (b)(1)(F).)

The record presents no basis for us to conclude there is an unreasonable risk Calderon-Lopez will commit one of those offenses. To the contrary, just over a year before the sentencing at issue here the court declined to revoke Calderon-Lopez's probation after her fifth violation in nine years. After it reviewed her history in considerable detail, the court found only a minor likelihood Calderon-Lopez would pose a danger to others and referred her for mental health treatment rather than imposing the recommended prison term. That finding cannot be squared with the People's current position that Calderon-Lopez could not be found eligible for mental health diversion under section 1001.36, subdivision (b)(1)(F) upon remand. The trial court will have to determine whether all the requirements set forth in section 1001.36, subdivision (b)(1)(A), are satisfied in this case, but, contrary to the People's position, we cannot say as a matter of law that Calderon-Lopez will not be able to establish eligibility.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant Calderon-Lopez diversion under that statute. If the court grants and Calderon-Lopez successfully completes diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) If the trial court does not grant diversion, or if it grants diversion but Calderon-Lopez does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the court shall reinstate the judgment. (*Weaver, supra*, 36 Cal.App.5th at p. 1122; *Frahs, supra*, 27 Cal.App.5th at p. 796.)

Siggins, P.J.

WE CONCUR:

Fujisaki, J.

Goode, J.*

People v. Calderon-Lopez, A156607

* Retired Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.